

1 **WO**

2
3
4
5
6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
8

9 Francisco Nunez Carrillo,

10 Petitioner,

11 v.

12 David Shinn, et al.,

13 Respondents.
14

No. CV-21-01742-PHX-ROS

ORDER

15 Petitioner seeks a writ of habeas corpus based on alleged errors during his trial and
16 convictions in state court. The Report and Recommendation (“R&R”) concludes
17 Petitioner’s claims lack merit and recommends the petition be denied and dismissed with
18 prejudice. (Doc. 15). Petitioner filed objections to which Respondents filed a reply. (Doc.
19 16, 17). The R&R is correct and will be adopted in full.

20 Neither party objects to the factual background contained in the R&R. In brief,
21 Petitioner was accused of shooting one person in the stomach. After a jury trial, Petitioner
22 was convicted of two counts of aggravated assault and one count of unlawful discharge of
23 a firearm. Petitioner was sentenced to 24 years on each aggravated-assault count and 3.75
24 years on the unlawful discharge count, with all three sentences to run concurrently.

25 On direct appeal, the Arizona Court of Appeals concluded the two convictions for
26 aggravated assault were multiplicitous. (Doc. 12-1 at 123). That court explained
27 Petitioner’s “two aggravated-assault charges stemmed from only one act—shooting [the
28 victim].” (Doc. 12-1 at 123). Based on that, Petitioner “committed only one act of

1 aggravated assault.” In deciding the appropriate remedy, the court determined “both
2 aggravated-assault convictions, in this case, carry identical sentences.” If there had been
3 any indication the trial court intended to impose different sentences on the two aggravated-
4 assault counts, the court would have remanded for the trial court “to determine which
5 conviction should be vacated.” But the court of appeals believed that was unnecessary and
6 opted to vacate one of the aggravated assault convictions. The Court of Appeals’ decision
7 to vacate one of those charges provided no meaningful relief to Petitioner. After the
8 appellate decision, Petitioner was left with a conviction for aggravated assault that required
9 he spend 24 years in prison as well as the conviction for unlawful discharge.

10 In October 2021, Petitioner filed the present habeas petition presenting a variety of
11 claims. As correctly explained by the R&R, those “claims, read together, raise one issue,
12 and that is a purported double jeopardy violation due to . . . multiplicitous” convictions.
13 (Doc. 15 at 8). While not clear from his filings, Petitioner’s argument appears to be that
14 the constitutionally required remedy for two multiplicitous convictions is to vacate both.
15 Thus, when the Arizona Court of Appeals chose to vacate only one of the aggravated
16 assault counts, Petitioner believes that violated his rights under the Fifth Amendment’s
17 Double Jeopardy Clause.

18 Respondents conceded Petitioner’s claim was timely and exhausted but they argued
19 the claim failed on the merits. The R&R agreed and found the Arizona Court of Appeals’
20 remedy regarding the two aggravated assault convictions was not contrary to, or an
21 unreasonable application of clearly established federal law. (Doc. 15 at 10). Having
22 reviewed that issue de novo, the R&R is correct. Petitioner has not cited any Supreme
23 Court authority requiring all multiplicitous counts be vacated.¹ The well-established rule

24
25 ¹ At times, Petitioner seems to argue the aggravated assault convictions and the unlawful
26 discharge convictions were all multiplicitous such that, of the three convictions, only one
27 could remain in place. Under this theory, Petitioner claims he should only have to serve
28 the sentence attributed to the unlawful discharge conviction. Petitioner does not develop
this argument in any detail and it does not appear Arizona’s aggravated assault and
unlawful discharge crimes are multiplicitous. Those two crimes each “requires proof of an
additional fact which the other does not.” *Blockburger v. United States*, 284 U.S. 299, 304
(1932).

1 is that when two convictions are deemed multiplicitous, the proper remedy is to vacate one
2 of the convictions, leaving the other conviction in place. *See, e.g., United States v. Zalapa*,
3 509 F.3d 1060, 1065 (9th Cir. 2007). That is what the Arizona Court of Appeals did in
4 Petitioner's case. There was no violation of clearly established federal law.

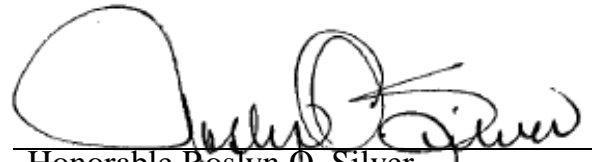
5 Accordingly,

6 **IT IS ORDERED** the Report and Recommendation (Doc. 15) is **ADOPTED**. The
7 petition for writ of habeas corpus (Doc. 6) is **DENIED** and **DISMISSED WITH**
8 **PREJUDICE**.

9 **IT IS FURTHER ORDERED** a Certificate of Appealability and leave to proceed
10 in forma pauperis on appeal are **DENIED** because the dismissal of the petition is justified
11 as the Petitioner has not demonstrated a substantial showing of the denial of a constitutional
12 right.

13 Dated this 17th day of May, 2022.

14
15
16
17
18
19
20
21
22
23
24
25
26
27
28



Honorable Roslyn O. Silver
Senior United States District Judge